(19,209)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 178.

WESTERN ELECTRICAL SUPPLY COMPANY, *Plaintiff in Error*,

vs.

ABBEVILLE ELECTRIC LIGHT AND POWER COMPANY, *Defendant in Error*.

In Error to the Supreme Court of the State of South Carolina.

STATEMENT OF PLAINTIFF IN ERROR.

This was a suit commenced November 7, 1900, by defendant in error, a local corporation of South Carolina, against plaintiff in error, a corporation of the city of St. Louis, state of Missouri, for damages alleged to have been suffered on account of alleged failure in guarantee of a certain electric light machine furnished by plaintiff in error to defendant in error.

This cause has twice been before the District Court of Abbeville County, and twice before the Supreme Court of South Carolina.

Service of process was attempted to be had by serving one Schminke, a traveling salesman of the plaintiff in error, who was inveigled into the state by defendant in error for the purpose of getting service upon him, and through him upon plaintiff in error. A special appearance was entered by plaintiff in error objecting to the jurisdiction of the court, and a motion was filed to quash the service on the ground that the court had not acquired jurisdiction of plaintiff in error; such special appearance is proper under the practice of the state of South Carolina (record, p. 13). The affidavits filed by plaintiff in error in support of the motion to quash the service stated that Schminke, at the time of the service, was not an officer of plaintiff in error, nor a director thereof; that he was simply a traveling salesman for it; that his duties and powers were solely to take orders for the sale of merchandise; that he was a resident of the city of New Orleans, Louisiana; that plaintiff in error had no office or place of business in the state of South Carolina; that Schminke was sent to the town of Abbeville, where the service was had, to examine into the running of the machine in controversy, and report the facts to the plaintiff in error at the request of defendant in error; that the contract between plaintiff in error and defendant in error, out of which the alleged cause of action arose, was not made in the state of South Carolina (record, pp. 13, 14). Counter affidavits filed by defendant in error identified certain letters passing between the parties, which confirmed the purpose for which Schminke was sent, at the request of the defendant in error, *i. e.*, to inquire into the trouble and report the results of his investigation to plaintiff in

error. Nothing contained in these letters from plaintiff in error indicates that Schminke was given or was to be given any power to settle the controversy (record, pp. 15, 16, 17). The trial court sustained the motion to quash and dismiss the cause. Upon appeal to the supreme court by defendant in error, that court reversed the trial court.

In that court the constitutionality of the statute authorizing the service was discussed at length in the briefs of parties and in the opinion of the court, and decided adversely to plaintiff in error.

The first opinion rendered in Abbeville E. L. & P. Company vs. Western Electrical Supply Company, 61 S. C. 361, is based upon two grounds:

First.—That because plaintiff in error had sold the machine in question to a South Carolina corporation and had received part payment on the same (although there was absolutely nothing in the record proving, or tending to prove, part payment), therefore, the courts of South Carolina were, under the statutes of that state, bound absolutely and "irrebutably" to hold that the contract was made in and was to be performed in South Carolina, and that plaintiff in error was engaged in business in South Carolina. From these premises the court drew the conclusion that plaintiff in error must be held to be engaged as a foreign corporation in business in that state, and service upon *any* agent was a valid service.

The statute quoted by the court to sustain these astounding and unconstitutional propositions are sections 4 and 5 of an act approved March 2, 1897, regulating foreign corporations, acts of 1897, p. 484, which reads as follows:

"Section 4.— . . . It shall be taken and deemed to be *the fact, irrebutable, and part and parcel of all* contracts entered into between such corporation (foreign) and a citizen or corporation of this state; that the taking or receiving from any citizen or corporation of this state of any charge, fee, payment, toll, import, premium, or other moneyed or valuable consideration, under or in performance of any such contract, or of any condition of the same, shall constitute the doing of its corporate business within this state, and that the place of the making and of the performance of any such contract shall be deemed and held to be within this state, anything contained in such contract or in any rules or by-laws of such corporation to the contrary notwithstanding.

Section 5.—That all such corporations hereafter doing business in this state, as defined in this act, shall be deemed and held to be doing such business under and in pursuance of the terms and conditions of this act, and that such terms and conditions shall be deemed and taken in all the courts of this state to be a part and parcel of all contracts hereafter entered into between such corporations and a citizen or corporation of this state, anything contained in such contract or in any rules or by-laws of such corporation to the contrary notwithstanding."

Second.—That the service upon *any* agent, as authorized in section 155, R. S. of South Carolina, amended by act approved March 2, 1899, was not repugnant to the Constitution of the United States, and reviewing the cases in the Supreme Court of the United States.

This act, as amended, so far as applicable, reads as follows:

"The summons shall be served by delivering a copy thereof as follows: . . . Such service can be made in respect to a foreign corporation only when it has property within the state, or the cause of action arose there, or when such service shall be made in this state personally upon the president, cashier, treasurer, attorney or secretary, or any agent thereof."

Upon the cause being remanded to the trial court, plaintiff in error again entered a plea to the jurisdiction, and filed affidavits similar to ones originally filed, and in addition the further fact was stated that plaintiff in error had never been engaged in business in the state of South Carolina, and that the contract in question was to be, by its terms, and actually was performed, in the state of Ohio, and that plaintiff in error had had a just and meritorious defense to the action.

The plea of plaintiff in error to the jurisdiction of the court specifically stated (record, p. 19) that its special appearance was for the purpose of finally appealing to the Supreme Court of the United States; that section 155 of the code of civil procedure of South Carolina, as amended March 21, 1899, providing for service upon foreign corporations, and the act entitled "an act to further prescribe the terms and conditions upon which foreign corporations may do business within the state," approved March 1, 1897, are both in contravention of the fifth and fourteenth amendments to the Constitution of the United States.

The trial court overruled the plea on the authority of the decision of the Supreme Court of South Caro-

lina, and plaintiff in error, having refused to plead further, rendered judgment in favor of the defendant in error against plaintiff in error. An appeal was then had to the Supreme Court of South Carolina; that court heard the appeal, and, after referring to the affidavits filed, affirmed the judgment of the lower court on the ground that the matter was *res adjudicata*. Writ of error was then sued out by plaintiff in error to this court.

ASSIGNMENT OF ERRORS.

The Supreme Court of South Carolina erred in holding and deciding that Subdivision 1 of Section 155 of the Code of Civil Procedure of South Carolina, providing for service of summons upon a foreign corporation, and the Act of the General Assembly of South Carolina amending the said section of the Code of Civil Procedure by striking out the word "resident," approved the 2d day of March, 1899, and also the Act of the General Assembly of South Carolina entitled "An Act to Further Prescribe the Terms and Conditions upon which Foreign Corporations May Do Business," approved the 2d day of March, 1897, were valid.

The validity of said section of the Code of Procedure and Acts of the General Assembly were denied and drawn in question by the defendant below (plaintiff in error here) on the ground of their being repugnant to the Constitution of the United States and in contravention thereof.

The Supreme Court of South Carolina erred in holding and deciding:

First.—That the said acts and section of the Civil Code are not repugnant to or in contravention of the fifth and fourteenth amendments to the Constitution of the United States, wherein it is provided that no person shall be deprived of life, liberty or property without due process of law; and wherein it is provided that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Second.—That said section of the Code of Civil Procedure, and the said acts of the General Assembly, did not abridge the privileges and immunities of citizens or of this defendant as guaranteed by said fourteenth amendment, and that the said section of the Code of Civil Procedure and the said acts did not deprive citizens of this defendant of property without due process of law contrary to the provisions of said fifth and fourteenth amendments of the Federal Constitution (record, p. 4).

POINTS.

I.

Three conditions are necessary to give a court jurisdiction in *personam* over a foreign corporation: First, it must appear that the foreign corporation was *carrying on* its business in that state; second, that the business was transacted by some agent or officer appointed by or representing such corporation in such state; third, the existence of some local law making such corporation amenable to suit as a condition, express or implied, of doing business in the state.

United States vs. American Bell Telephone Co., 29 Fed. Rep. 17.

Mr. Justice Field states the rule in St. Clair vs. Cox, 106 U. S. 350, thus:

"It is essential in order to support the jurisdiction of the court to render a personal judgment against a foreign corporation that the corporation was *engaged in business* in the state, and that service of process was made upon its agent there. It could then be shown that the agent stood in no representative character to the corporation, that his duties were limited to those of a subordinate agent, or to the particular transaction, or that his agency had ceased."

To the same effect Goldey vs. "Morning News," 156 U. S. 518, and Conley vs. Mathieson A. Works, 190 U. S. 406.

These rules are quoted with approval by Mr. Justice Peckham in Mut. Life Ins. Co. vs. Spratley, 172 U. S. 602 (615) (618).

In this last case the question of representative character is treated (page 614) as follows:

"It is a question simply whether a power to receive service of process can reasonably and fairly be implied from the kind and character of agent employed." And (page 617): "If it appear . . . . . that the character of the agency is such as to render it fair, reasonable and just to imply an authority on the part of the agent to receive service, the law will and ought to draw such an inference," etc.

In the Spratley case the agent had been employed a great number of years by the company as an adjuster with discretionary powers to adjust that particular claim.

In the case at bar, Schminke was a mere traveling salesman in the employ of plaintiff in error only for a short time to take orders subject to approval, who, while on a regular trip, was diverted from his regular route and sent to Abbeville to look into the complaint of defendant in error with instructions to report the facts to plaintiff in error. (Record, pp. 13, 14.) He had no general powers in any direction, and not even power to adjust this particular claim.

It is undisputed that the contract in question was not made in the state of South Carolina, as shown by the first affidavit filed by plaintiff in error, and if the second affidavit is considered, it is shown that the contract was, by its terms, to be, and actually was, performed in Ohio, by delivering the machinery to defendant in error there. Even if the order had been taken in South Carolina, it would not be a carrying on or doing business in the state of South Carolina.

Cooper Mfg. Co. Ferguson, 113 U. S. 727;

Delaware & Hudson Canal Co. vs. Mahlenbroch, 43 N. J. L.; 281
6 Thomp. Corp., Sec. 7936;
5 Am. & Eng. Enc. Law, p. 71;
8 Am. & Eng. Law, p. 346.

The second affidavit also stated that plaintiff in error was not and never had been engaged in business, nor had an office, nor an agent in the state of South Carolina. These facts are not disputed or denied by counter affidavit, nor, in fact, has it ever been contended by defendant in error that plaintiff in error was ever actually engaged in business in the state of South Carolina. These being the conceded facts, it therefore became necessary for the Supreme Court of South Carolina, in order to sustain the jurisdiction of the court over the plaintiff in error in this case, to construct some theory by which plaintiff in error, although not actually engaged in business there, could be held to be constructively engaged in business there. The course of reasoning by which the Supreme Court of South Carolina arrives, as it does, at its conclusion, is certainly remarkable and unique in the annals of judicial history. This is worked out in the following manner: The state of South Carolina has a statute, being an act approved March 2, 1897, regulating foreign corporations. (Acts 1897, p. 484.)

The parts of that act which are material to this inquiry are sections 4 and 5, which are as follows:

"Section 4.— . . . . It shall be taken and deemed to be the fact, irrebutable, and part and parcel of all contracts entered into between such corporation (foreign) and a citizen or corporation of this state, that

the taking or receiving from any citizen or corporation of this state of any charge, fee, payment, toll, import, premium or other moneyed or valuable consideration, under or in performance of any such contract, or of any condition of the same, shall constitute the doing of its corporate business within this state, and that the place of the making and of the performance of any such contract shall be deemed and held to be within this state, anything contained in such contract or in any rules or by-laws of such corporation to the contrary notwithstanding.

"Section 5.—That all such corporations hereafter doing business in this state, as defined in this act, shall be deemed and held to be doing such business under and in pursuance of the terms and conditions of this act, and that such terms and conditions shall be deemed and taken in all the courts of this state to be a part and parcel of all contracts hereafter entered into between such corporations and a citizen or corporation of this state, anything contained in such contract or in any rules or by-laws of such corporation to the contrary notwithstanding."

This remarkable statute forms the premise upon which the court's opinion stands. It only remained, therefore, this premise being, as that court itself says, "irrebutable," for the court to be convinced that the Western Electrical Supply Company, a foreign corporation, had made a contract with defendant in error, which was admitted, and had received part payment, in order to enable the court to draw the conclusion that the Western Electrical Supply Company was doing business in the State of South Carolina, and that the contract had been made in that state and

was to be performed in that state. Neither the petition in the case nor the affidavits filed alleged that defendant in error had paid anything on account of the contract to plaintiff in error, nor did the affidavits contain anything which intimated that a payment had been made. This, however, did not trouble the Supreme Court of South Carolina, for that court, speaking through the chief justice, said they would simply "infer" that a payment had been made. Having, therefore, established this premise by virtue of the statute itself, and having established the next step by an inference founded upon nothing, the court then drew its "irrebutable" conclusion that plaintiff in error was doing business in the state of South Carolina; that the contract was made there, and was to be performed there. Having established this conclusion by such a course of reasoning, the court triumphantly concludes: "Under this view this case must be regarded as a case in which a domestic corporation having, as it supposed, a claim against a foreign corporation doing business in this state, arising out of a contract made and to be performed in this state, has undertaken to commence its action against such foreign corporation by serving, personally, within the limits of this state, an agent of such foreign corporation with a copy of the summons; and in such a case we do not think that any authority has been, or can be, cited which holds that the state court had not thereby acquired jurisdiction of the foreign corporation."

This court has gone further in the Spratley case to sustain the jurisdiction of the state court over foreign corporations than in any other case, because in that

case the insurance company had ceased to do business in the state of Tennessee, in the ordinary sense in which those words are used, because it was no longer soliciting contracts of insurance in that state, nor was it maintaining an office or agent there. The company had, however, for many years prior to that time actually maintained an office in this state, complying with the state laws in regard to insurance, and still had in force a great many contracts of insurance with citizens of that state, which had been taken out while it was actually engaged in business there, and was still receiving premiums from these policy-holders. The claim in question, on which suit was brought in that case, was based upon one of these identical policies. This court therefore held that while it was not actually engaged in business in the sense of soliciting new contracts or maintaining an office, yet it was engaged in business in the sense of continuing the old business, because it was receiving premiums from these policyholders. The representative character of the agent upon whom service was had was established to the satisfaction of this court, because he had for many years been employed by the company as an adjuster with discretionary powers, and was sent into the state this particular time for the express purpose of adjusting, with discretionary power, the claim in suit. It would readily be seen that there is a wide difference between facts of the Spratley case and those in the case at bar. Here plaintiff in error cannot be said to be doing business in the state of South Carolina except by a fiction of law founded upon an unconstitutional statute; further, the agent upon whom service has been had is

not a representative agent in any sense of the term, as he had only been employed a short time as a mere salesman, and had no discretionary power, either in this case or in any other.

As the plaintiff in error has not applied for permission to do business in South Carolina, or, in fact, done business there, it cannot be made to accept as a result of an act done outside of the state that which *might* be binding upon it, if it had accepted the conditions of doing business in the state, merely because the legislature of South Carolina has chosen to say that such a result shall follow. Neither the legislative fiat nor the decision of the courts of South Carolina are binding in this court on matters of service upon a foreign corporation.

Barrow S. S. Co. vs. Kan., 170 U. S. 100.

III.

The point is made in the motion to dismiss, that this court has jurisdiction because the decision of the Supreme Court of South Carolina, on account of which the writ of error is sued out, is based upon the doctrine of former adjudication. This is easily disposed of. Plaintiff in error could not appeal from the first decision of the Supreme Court of South Carolina, because that was not a final judgment. It could not appeal to this court from the last judgment of the trial court, because that court was not the court of last resort. It must appeal to the Supreme Court of South Carolina, even though that court would affirm the judgment on the ground that the question was *res adjudicata*. Plaintiff in error followed the

method prescribed by this court in Great Western Telegraph Co. vs. Burnham, 162 U. S. 339, and is here on the authority of that case.

Respectfully submitted,

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